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In The

Supreme Court of the United States

October Term, 1976

No. 76-1372

RICHARD JOSEPH TODARO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, RICHARD JOSEPH TODARO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 24, 1977.

OPINION BELOW

The opinion of the Court of Appeals dated February 24, 1977 is printed in Appendix A, *infra*, at p. A-1, *et seq*.

JURISDICTION

Following a jury trial, petitioner was found guilty in the United States District Court for the Western District of New York of one count of conducting an illegal gambling business in violation of §1955 of Title 18 of the United States Code and one count of destroying property to prevent seizure in violation of §2232. On August 17, 1976 petitioner was sentenced to three years in prison on the gambling count and one year on the destruction of property count, the sentences to run concurrently.

On February 24, 1977 the Court of Appeals for the Second Circuit reversed the conviction for conducting an illegal gambling business and dismissed that portion of the indictment, and affirmed the judgment of conviction for destruction of property to prevent seizure.

This petition for a writ of certiorari is filed within forty-five days of that decision, an extension of time having been granted by Mr. Justice Marshall in an Order dated March 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

§2232. Destruction or removal of property to prevent seizure

Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether petitioner's conviction for destroying property in violation of 18 U.S.C. §2232 (destroying property to prevent seizure) can be constitutionally sustained where there is absolutely no proof that he knew the property sought to be seized was the subject of a search warrant and; whether the dramatic conflict between the Third and Second Circuits on this crucial issue should be resolved.

STATEMENT OF FACTS

The petitioner, Richard Todaro, is a 40-year-old family man and father of four children, who in 1972 called a bookmaker in Buffalo, New York ten times and gave him the point spread or "line" on basketball games.* When two FBI agents entered petitioner's home on March 6, 1972, in search of betting sheets or gambling paraphernalia, petitioner ignited a piece of flash paper. Thereafter, he was charged with destroying property that is the subject of a search warrant in violation of 18 U.S.C. §2232.

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*In a decision dated February 24, 1977 the United States Court of Appeals for the Second Circuit reversed petitioner's conviction for conducting an illegal gambling business and dismissed that count of the indictment. The Second Circuit held that there was no "proof of any such violation" of 18 U.S.C. § 1955 (Slip Op. at 1972).

On March 6, 1972 FBI agents George Fellows and James Caufield, armed with search warrants, went to Richard Todaro's home at 52 Bannard Avenue in the Town of Tonawanda, outside of Buffalo. When no one responded to Agent Fellows' announcement at the front door, he went around to the back door and found it unlocked. He claims he announced himself as being with the FBI but admitted it may not have been loud enough for an occupant of the house to hear. He unlocked the front door from the inside so that Agent Caufield could enter the house. Both FBI agents then made a cursory examination of the first floor.

Finding no one there, they started up the stairs to the second floor. Again, Agent Fellows claims he said "FBI" as he climbed the stairs but could not swear that he stated that he possessed a search warrant. Significantly, in his report, although he recorded that he announced "FBI", there was absolutely no mention that he ever announced the possession of a search warrant. On cross-examination, after being confronted with his report, Agent Fellows confessed that he could not swear that he said anything about search warrants.*

*"By Mr. Fahringer:

Q. I am showing you Court Exhibit 13 [the "302"] and I ask you whether that is a reproduction of your report covering the search of Mr. Todaro's home on March 6, 1972?

A. Yes, sir.

Q. And is it dated the very same day, March 6, 1972?

A. It is.

* * *

Q. You don't say anything about announcing "search warrant", do you?

A. No, sir (622). [Refers to pages of appendix filed in United States Court of Appeals for the Second Circuit.]

* * *

Q. Nothing mentioned about announcing "search warrant", is there, in the report?

A. No, there isn't.

* * *

Footnote continued on next page

Although Agent Fellows was examined about his entrance into the home before the grand jury, he never stated that he announced that he was from the FBI or that he said he had a search warrant.

Just prior to the agents' entry of the bedroom, they observed petitioner leap from his bed to a desk. Then they saw a burst of flame which left no residue. Agent Fellows concluded that what he saw burning was flash paper. Despite these observations, petitioner was not arrested nor were his movements restricted in any way during the time the agents searched the house. No evidence of bookmaking was ever found and the agents left petitioner's home without taking him into custody.

On February 6, 1973 a three-count indictment was filed in the United States District Court for the Western District of New

Footnote continued from preceding page

Q. Well, don't you put the important things down?

A. Yes, we do.

Q. All right. You put in that you announced yourself as FBI, didn't you?

A. Yes.

Q. Okay. Now, let's see about when you went upstairs, 'Immediately upon entry Special Agent Fellows and Caufield went to the second floor of the residence via the stairway', and you don't say anything about making a cursory search of the ground floor, do you?

A. No" (623, 624).

* * *

Q. So that in this courtroom today, some three years later, is the first time you have told us about saying anything about a search warrant, isn't that so? Well, let me strike that question. Your testimony today I believe is you may not have said 'Search warrant', isn't that true?

A. It is possible I did not say 'search warrant'.

* * *

Q. [S]o that we are right with this jury, you cannot swear here today that you said 'search warrant', can you?

A. I cannot" (626).

York charging petitioner with one count of conspiracy, one count of conducting an illegal gambling business in violation of §1955, and one count of destroying property that is the subject of a search warrant in violation of §2232. At the close of the evidence the court granted petitioner's motion to dismiss the conspiracy count.

Petitioner was convicted of counts two and three on April 29, 1976 and sentenced on August 17, 1976 to three years imprisonment on count two and one year on count one, the sentences to run concurrently. The United States Court of Appeals for the Second Circuit reversed the judgment of conviction for gambling but affirmed the conviction for destruction of evidence on February 24, 1977.

REASONS FOR GRANTING THE WRIT

Petitioner's conviction for destroying property in violation of 18 U.S.C. §2232 (destroying property to prevent seizure) cannot be constitutionally sustained because there is absolutely no proof that he knew the property sought to be seized was the subject of a search warrant and; the conflict between the Third and Second Circuits on this crucial issue should be resolved.

The sole question we bring to this Court is whether petitioner's conviction under §2232 can be constitutionally sustained without any proof that he knew the property sought to be seized was the subject of a search warrant. This crucial question has dramatically divided the Third and Second Circuits, two of the most prestigious circuits in our nation. In *United States v. Gibbons*, 331 F.Supp. 970 (D. Del. 1971), *aff'd*, 463 F.2d 1201 (3d Cir. 1972), the Third Circuit stressed that in order to sustain a conviction under §2232 the government must prove beyond a reasonable doubt the defendant knew there was an outstanding search warrant.*

The Second Circuit's decision is in direct conflict with this well reasoned and firmly established rule. In 1976 there were 30 prosecutions throughout the United States under §2232.** Obviously, this form of prosecution is becoming most popular among federal prosecutors. Thus, it is imperative that the law

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*The Third Circuit stated:

> "[I]n order to obtain a conviction under Section 2232, a jury must find an intent to do the act charged. Intent carries with it the element of scienter, so that the Section must be interpreted as making it a crime to destroy property or evidence with the knowledge that there is an outstanding search warrant or the existence of 'hot pursuit' " (331 F.Supp. at 972).

**Statistics obtained from Statistical Analysis and Reports Branch of the Administrative Office of United States Courts.

governing this form of government action be clarified. The discordant view of these two major circuits must be authoritatively resolved or this ever widening gap between these courts will lead to intolerable confusion and despair among the trial courts of this nation.

In our case the government failed to present any proof demonstrating, in any way, that the petitioner knew the agents had a search warrant and were seeking to seize the property destroyed. Nevertheless, the Second Circuit sustained his conviction, apparently concluding that no proof on this element is required. The Court of Appeals stated:

> "Assuming that Todaro was awakened from sleep by the sound of the FBI agents' entry, his actions in leaping from his bed and igniting flash paper were indicative of his desire to destroy to prevent seizure" (Slip. Op. at 1972).

This statement misconceives the intent of §2232 because these facts do not cover the crucial element of scienter established in an unbroken series of cases extending over a long stretch of this Court's history. *Cf. Morissette v. United States*, 342 U.S. 246 (1952); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Murdock*, 290 U.S. 389 (1933). It is not knowledge that law enforcement agents are on the premises or seek to arrest the defendant or want to speak to him that the statute requires. The critical component of intent is that the defendant know the agents have a search warrant which authorizes the seizure of his property. There was absolutely no evidence supporting this vital element. It must be stressed that a person has a constitutional right to destroy his own property. Section 2232 only proscribes the destruction of property that is the subject of a search warrant.

The rule established in *Gibbons* is well-conceived and sets forth fully all necessary elements that must be proved for a constitutionally valid conviction. This Court should not permit

the existence of a conflict whereby one circuit requires proof of specific intent for a violation of §2232 while another circuit upholds a conviction which is unsupported by any evidence of knowledge of a search warrant.

Analogous to the requirement of knowledge for a §2232 conviction is *Walker v. United States*, 93 F.2d 792 (8th Cir. 1938), where the defendant was convicted of influencing, intimidating, or impeding a witness. The court in reversing defendant's conviction stressed:

> "[T]he burden was upon the government not only to prove that Chloe G. Albright was or intended to be a witness at the time of the conversations in evidence, but, also, that the appellant then and there had knowledge or notice or information of that fact, and that it was because of such status that appellant corruptly endeavored to influence her" (93 F.2d at 795).

There was not one iota of proof adduced to show that petitioner knew the flash paper he destroyed was the subject of a search warrant. Petitioner was clad in pajamas and was alone in the house on the morning of March 6, 1972. Clearly he had been sleeping. The mere fact that the agents claimed they announced "FBI" and assuming petitioner heard that announcement, still gave no notice of their purpose of their entry. Petitioner could have thought that they were preparing to arrest him. The more usual objective of entering a suspect's home is either to interview or arrest him. The plan of executing a search warrant, requiring judicial approval, is the exception.

To suggest that petitioner possessed the requisite scienter simply because he destroyed the flash paper creates a constitutionally impermissible inference. *Cf. Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969). His igniting the flash paper would be consistent with his notion, albeit mistaken, that the federal agents were state police

officers.* The possession of flash paper is a crime in New York (*see* Penal Law §225.15[3]). Inferentially, petitioner was destroying the flash paper to prevent what he thought were state officers from finding him in possession of New York contraband. The government never claimed or proved that the flash paper contained any writing. Under these circumstances the destruction was not to prevent seizure of something that was subject to a search warrant.

The number of cases and disparity in disposition indicates that violations of 18 U.S.C. §2232 present a continuing problem and one which should be resolved by this Court. This most unfortunate decision, perhaps the Second Circuit's worst miscalculation in the past decade, because it so gravely undermines fifth amendment principles, is bound to sponsor laxity in law enforcement procedures if not immediately corrected. The Court of Appeals decision reflects a lact of understanding of the judicial and congressional history of judicially authorized seizure of property.

*If appellant had heard Fellows and Caufield announce "FBI" as they ascended the stairs, why would he have waited until they finished climbing the stairs and enter the master bedroom before he acted? His waiting until the last moment — as the agents were standing in the threshold of the doorway — to leap across the room and ignite the flash paper strongly suggests that petitioner never heard any announcement, if in fact one was given. The only logical conclusion is that he heard footsteps of men whom he believed were state law enforcement officers.

CONCLUSION

For all these reasons, the Court should grant this petition for certiorari.

April, 1977

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 499 — September Term, 1976.
(Argued December 1, 1976 Decided February 24, 1977.)
Docket No. 76-1355

United States of America,

Appellee,

against

Richard Joseph Todaro,

Appellant.

Before:

Moore, Feinberg and Gurfein,

Circuit Judges.

Appeal from judgment entered in the United States District Court for the Western District of New York, Honorable John T. Curtin, *Chief Judge*, following a jury verdict convicting appellant of conducting an illegal gambling business, in violation of 18 U.S.C. §1955 (1970), and destruction of flash paper to prevent its seizure by FBI agents, in violation of 18 U.S.C. §2232 (1970).

Affirmed in part; reversed in part.

Opinion of the United States Court of Appeals for the Second Circuit

Ivan M. Schaeffer, Department of Justice, Washington, D.C. (Richard J. Arcara, United States Attorney for the Western District of New York, Buffalo, N.Y.; Sidney M. Glazer, Attorney, Department of Justice, Washington, D.C., of counsel), *for Appellee.*

Herald P. Fahringer, Esq., Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, New York, of counsel, Paul J. Cambria, Jr. and Barbara J. Davies, on the brief), *for Appellant.*

Moore, *Circuit Judge:*

Richard Todaro appeals from a judgment entered upon a jury verdict, convicting him of violating 18 U.S.C. §1955 (1970) (conducting an illegal gambling business) and 18 U.S.C. §2232 (1970) (unlawful destruction of flash paper to prevent its seizure by FBI agents).[1]

Apparently in early 1972 the Government conducted a substantial surveillance operation to ferret out what it believed was a major gambling operation in the Buffalo, New York area. The focal points were the Riverside News Stand, the Kenmore News Shop and an apartment on Ontario Street, Buffalo. The principal suspects were Anthony Castellani ("Anthony"), his father, Stephen Castelani ("Stephen"), Richard Giglia (Anthony's cousin), Sam Giglia and a John Zak. Anthony and Stephen were bookmakers and their activities covered horses (racetrack), football and basketball. Richard Giglia, Sam Giglia, John Zak and others accepted bets for Anthony and Stephen at various locations.

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[1]A third count, charging conspiracy to engage in an illegal gambling business, in violation of 18 U.S.C. §371 (1970) was dismissed by the court at the close of the evidence.

Opinion of the United States Court of Appeals for the Second Circuit

On September 8, 1972, the five principal suspects named above, who may be called the operators of the business and who actually took the bets, pleaded guilty to informations charging them with transmitting gambling information over the telephone, in violation of 18 U.S.C. §1084(a) (1970).[2] They all received comparatively trivial sentences and the jail terms for all were suspended.[3]

The indictment against appellant Todaro, charging him with (1) conspiracy to engage in an illegal gambling business, in violation of 18 U.S.C. §371 (1970) (Count I); (2) conducting an illegal gambling business, in violation of 18 U.S.C. §1955 (1970) (Count II); and (3) destruction of property which was the subject of a search warrant, in violation of 18 U.S.C. §2232 (Count III), was not issued until February 6, 1973.

More than three years later, Todaro was put on trial (April 20, 1976). The record is devoid of any explanation for this hiatus. His participation in the Castellanis' bookmaking business was negligible. It consisted entirely of his furnishing, by means of nine or ten telephone calls, over some twelve days in February 1972, "line" information to the actual bookmakers

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[2]18 U.S.C. § 1084(a) (1970) provides, in pertinent part, as follows:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[3]Stephen received a $2,000 fine, a suspended two-year sentence, and five years probation; Anthony, a $1,000 fine, a suspended one-year sentence, and five years probation; Richard Giglia, a $1,000 fine, a suspended one-year sentence, and five years probation; Sam Giglia, a suspended sentence and five years probation; and John Zak, just five years probation.

with respect to a predicted point spread between various basketball teams about to enter the arena.[4]

The chief witnesses for the Government were the Castellanis, who, having obtained "immunity" from the Government, felt free to disclose the manner of their operations. As in Stephen's opinion he was "[o]ne of the best" line makers in the business, he more than willingly disclosed how he made up his line, *i.e.*, information gleaned from sports papers, radio announcements, handicappers, others with whom he talked and, of course, his own judgment.

The trial as presented by the Government was scarcely a trial against Todaro — rather as above mentioned, it was an expose of the Castellanis by the Castellanis. Reading the record one would gather that they were the defendants. Inadequate proof was offered that Todaro was one who "conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business". 18 U.S.C. §1955(a).

Stephen, on whom the Government relied, was emphatic in establishing that Todaro was not in this category. Witness the following question and answers (App. 511):

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[4]The Fifth Circuit provided a "how to" summary of bookmaking operations in *United States* v. *Box*, 530 F.2d 1258, 1260 (5th Cir. 1976). The Court described the use of "line" information as follows:

> "So that betting odds can remain even on each game, a bookmaker normally has a 'line'—on each game on which he is taking bets, one team will be favored by a certain number of points, called the 'point spread'.
>
> In an ideal situation, a bookmaker would have bets from bettors exactly balanced on each contest, so that no matter which team 'wins' (read: beats the point spread), the bookmaker is assured a definite percentage of the amount bet." 530 F.2d at 1261 [footnotes omitted].

> "Q. * * * Mr. Castellani, did Richard Todaro have anything to do with your bookmaking operation whatsoever?
>
> A. Never in his life.
>
> Q. Did he have anything to do with your son's bookmaking operation?
>
> A. Never in his life. I was the boss."

The Government's brief on this appeal convincingly establishes the guilt of the Castellanis and others under §1955 — but they were not on trial. Only Todaro was on trial and his role was so insignificant that even giving exaggerated importance to his participation cannot elevate him beyond that of a comparative outsider supplying one of the sources of information possibly used by the Castellanis.

"In enacting 18 U.S.C. §1955, Congress intended to reach all individuals who made a large bookmaking operation (five or more persons with a $2000 gross on any day or of 30 days or more duration) possible." (Gov't, Br., p. 10). There was no proof that Todaro placed bets, received bets, acted as a runner, was an employee of the Castellanis or *participated* in the *operation* of their business. Even mindful of the breadth we gave to this Congressional intent in *United States* v. *Becker*, 461 F.2d 230 (1972), *cert. denied*, 420 U.S. 776 (1974), there was no proof adequate to place Todaro in any of the mentioned categories.[5]

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[5] "Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business." *United States* v. *Becker*, 461 F.2d at 232.

An extensive review has been made of the many cases cited by the Government and Todaro alike.[6] The only conclusion, fairly to be drawn, therefrom is that each case had to be resolved on its own specific facts. The facts before us here leave us with a profound conviction that the Castellani case, in effect, was tried four years after the 1972 investigation but that the jury by that time had only one defendant to convict, namely Todaro, who by insisting upon a trial (as was his right) placed himself in a vulnerable position. Conviction, however, must be justified by some violation of some statute. Without proof of any such violation Todaro's conviction under Count II cannot stand.

Todaro received a sentence of three years imprisonment on Count II, and of one year on Count III. His conviction on Count III presents an entirely different situation. His conduct in setting fire to the flash paper for which the agents had a

[6] Among others, *United States* v. *McCoy*, 539 F.2d 1050 (5th Cir. 1976) (no violation of §1955 where defendant bookmaker merely exchanged line information with another, independent bookmaker); *United States* v. *Leon*, 534 F.2d 667 (6th Cir. 1976) (no violation where defendant merely supplied line information and did not accept "layoff" bets); *United States* v. *Guzek*, 527 F.2d 552 (8th Cir. 1975) (violation where defendants supplied line information, accepted "layoff" bets, and provided advice on gambling operations); *United States* v. *Box*, *supra* (no violation where defendant did not supply information and accepted occasional "lay off" bets); *United States* v. *Joseph*, 519 F.2d 1068 (5th Cir. 1975), *cert. denied*, 424 U.S. 909 (1976) (violation where defendants were one among other sources of line information and accepted occasional "layoff" bets).

search warrant definitely brought him within the purview of 18 U.S.C. §2232.[7]

The trial court clearly and fairly instructed the jury as to the essential factual elements to be determined by them in order to arrive at a guilty verdict. Assuming that Todaro was awakened from sleep by the sound of the FBI agents' entry, his actions in leaping from his bed and igniting flash paper were indicative of his desire to destroy to prevent seizure.

The conviction under Count II is reversed and the indictment dismissed; the conviction under Count III is affirmed.

[7] "Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both."